No. 79-6423

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ABBY GAIL LASSITER,

Petitioner,

v.

DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY, NORTH CAROLINA,

Respondent.

(IN THE MATTER OF WILLIAM L. LASSITER)

ON WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF *AMICUS CURIAE* OF NATIONAL CENTER ON WOMEN AND FAMILY LAW, INC., COMMUNITY ACTION FOR LEGAL SERVICES, INC. AND BEDFORD-STUYVESANT COMMUNITY LEGAL SERVICES CORPORATION

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Community Action for Legal Services, Inc., National Center on Women and Family Law, Inc., and Bedford-Stuyvesant Community Legal Services Corporation, respectfully move, pursuant to Rule 36 of this Court's Rules, for permission to file the within brief Amici Curiae in Lassiter v. Department of Social Services of Durham County, North Carolina, by reason of the Amici's substantial interest in the outcome of this case and their considerable experience in litigation concerning the issues presented herein.

The attorneys for all parties to this appeal have been requested to consent to the filing of this brief and Counsel for both Appellant and Appellees have granted their consent.*

*Letters of consent have been filed with the Clerk of this Court.

INTEREST OF AMICI CURIAE

Community Action for Legal Services, Inc. is the largest civil legal services program in the nation. Funded by the National Legal Services Corporation as successor to the United States Office of Economic Opportunity (OEO) legal services program, CALS provides a full range of civil legal services to indigent New York City residents who cannot afford to pay a private attorney. CALS has a full time staff of over 121 attorneys, based in 21 neighborhood offices, who provide legal assistance to more than 40,000 persons a year. CALS attorneys provide representation in all the trial courts in New York City, in the State and Federal Appellate Courts and in this Court. Bedford-Stuyvesant Community Legal Services Corporation is one of CALS' delegate corporations. Its neighborhood office is located in

Brooklyn, New York. It has one of the most active family law practices of any of the neighborhood offices.

Approximately 20% of the cases handled by CALS neighborhood legal services offices, including Bedford Stuyvesant Community Legal Services Corporation, are in the area of family law. These cases include a significant number involving the termination of parental rights in the Family Court of the State of New York -- at least 1,000 cases since 1967.

Attorneys associated with CALS as well as Bedford-Stuyvesant Legal Services have handled many reported cases involving termination proceedings and related areas of family law, including Smith v. Organization of Foster Families, 431 U.S. 816 (due process claims of foster parents in relation to foster children and their natural parents); Shelton v. Smith 422 F. Supp. 460 (E.D.N.Y. 1976) aff'd,

547 F. 2d 768 (2d Cir. 1976) (termination of visitation between parents and children in foster care without due process); Matter of Ray A.M. 37 N.Y. 2d 622 (termination of parental rights); and Matter of Orlando F. 40 N.Y. 2d 103 (1976) (termination of parental rights).

National Center on Women and Family Law, Inc. is a private not-for-profit organization incorporated under the laws of the State of New York for the purpose of litigating on behalf of poor women in the area of family law and to provide technical assistance on women's issues and issues in family law to Legal Services attorneys in every state.

The constitutional question raised by the instant appeal, namely whether due process requires that an indigent parent, in a proceeding to involuntarily terminate her parental rights with regard to her child, must be

assigned counsel, is one of central concern to Community Action for Legal Services, Inc., National Center on Women and Family Law, Inc., and the Bedford-Stuyvesant Community Legal Services Corporation.

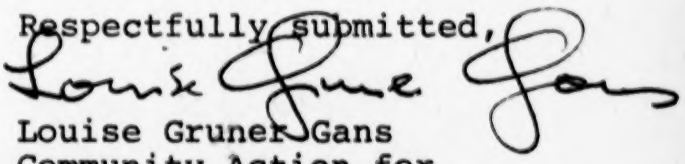
The Amici have considerable experience with the kinds of constitutional issues which are presented here, and with the way these issues affect indigent parents. They are well acquainteded with policies and practices of state foster care agencies which often lead to unnecessary termination of parental rights. They know well the complexity of parental termination hearings, the patterns of procedural irregularity which occur in so many of these cases, and the economic, racial and sexual biases inherent in the process.

Accordingly, Amici wish to submit their brief because of their concern about the impact of this case on

their clients and because they hope to be able to present to the court an analysis of the issues from the standpoint of the indigent parent which may not otherwise be presented.

Wherefore, Community Action for Legal Services, Inc., National Center on Women and Family Law, Inc., and Bedford-Stuyvesant Community Legal Services Corporation respectfully request leave to file the attached brief as Amici curiae.

Respectfully submitted,



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BRIEF AMICI CURIAE OF
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INTEREST OF AMICI CURIAE

The interest of the Amici curiae is set forth in the accompanying motion, supra.

STATEMENT OF THE CASE

This case is before this court a result of the issuance of a writ of certiorari to review the decision of the North Carolina Court of Appeals, filed November 6, 1979, affirming the judgment of the District Court of North Carolina for Durham County, which on September 7, 1978 permanently terminated the parental rights of the Appellant, Abby Gail Lassiter, to her child. Appellant is a young indigent black woman, whose son William was born on September 24, 1974. In April 1978, the Durham County Department of Social Services filed a petition for termination of Appellant's parental rights to William. Appellant received notice of the proceeding in

prison. On August 31, 1978 a hearing was held on the termination petition, Appellant and her mother both appeared at the hearing but Appellant was not represented by counsel. When questioned by the court about when she received notice of the hearing, Appellant showed considerable confusion about the dates of various notices. When the court asked her whether she had sought legal help with the case, she said simply that she had told the matron at the prison about it but that the matron had done nothing to help. Although the court referred Appellant to a Legal Services office at the close of the hearing for help with her appeal, no such referral was made before the hearing. The court permitted Appellant to proceed with the hearing without counsel. On the basis of this hearing, the court issued its decision terminating Appellant's parental rights.

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires a state to furnish an indigent parent court-appointed counsel in a proceeding to terminate permanently and irrevocably her parental rights.

SUMMARY OF ARGUMENT

A proceeding for termination of parental rights results in the ultimate deprivation of a fundamental civil right: the right of a parent to the "care, custody, management and companionship of her minor children" May v. Anderson, 345 U.S. 528, 533 (1953). Termination of parental rights has been likened to the death penalty.

Because of the severity of the deprivation and the complexity of the issues involved, and because of the special dynamics of the foster care system, the meaningful defense of a parent in foster care is particularly difficult.

An indigent mother appearing in court alone has no capacity to understand or deal with her situation. In the absence of counsel, the risk of an erroneous termination is extremely high.

The provision of counsel could significantly decrease the risk of error, as counsel would develop and present defenses which the parent would be unable to recognize, insure that the state's burden of proof is met and supported by reliable evidence, and protect the parent against bias and impropriety.

Making the termination proceeding more fair and reliable would further the interests of the state. The state's interest in fair adjudication is consis-

tent with its interest in preserving families and protecting children. Erroneous termination of parental rights disserves those interests as the state may not promote adoption for its own sake at the expense of protected familial rights. The cost of providing assigned counsel is not a sufficiently significant detriment.

Due process requires the provision of assigned counsel for indigent parents in termination cases. Without counsel, such parents are deprived of a meaningful opportunity to be heard. Termination proceedings are closely analogous to criminal cases in purpose, structure, and possible outcome. The nature and consequences of the proceeding and the goal of equal justice require that assigned counsel be provided in all cases.

DUE PROCESS REQUIRES COURT APPOINTMENT OF COUNSEL FOR INDIGENT PARENTS IN PROCEEDINGS FOR TERMINATION OF PARENTAL RIGHTS

A. Introduction

For many parents and families termination of parental rights is the bitter and fatal end of the foster care placement of their children. Amici have found that like the Appellant, Abby Gail Lassiter, most parents find the very concept of termination of parental rights unthinkable and incomprehensible.[1] The utilitarian concept of the "disposable" family developed by the "helping" professions, whereby deprived, incapacitated or deviant family members can be discarded and replaced by ones having more utility, is alien to ordinary Americans.

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1. .....he knows us and he knows my mother. And I feel why you should adopt him, he have a family, we are his family. Why you want to place him in adoption among strange people that not his family and they got no relationship to him and his family is over here, my mother and I." (Trial T p.22-23).

While Amici believe that in the case of a truly homeless and unwanted child termination of parental rights may be a necessary means to provide the child with a permanent home, this draconian measure has not proven to be a panacea for foster children and has often been profoundly unjust in its application.

In Smith v. Organization of Foster Families, 431 U.S. 816, 828-31 (1977), this court had an opportunity to scrutinize some aspects of the foster care system. But the focus of the class of parents in Smith was on the rights of parents, foster parents and children in circumstances where social services officials or public agencies were proposing the removal of the children from foster care for the purpose of returning them home. When social services officials initiate proceedings to terminate parental rights, however, parents and extended family members find those officials and frequently also the foster parents

squarely arrayed against them.

An understanding of the foster care context in which proceedings for termination of parental rights are brought will assist the court in making its assessment of

> first the private interest that will be affected by the official action, second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Matthews v. Eldridge, 424 U.S. 319, 335 (1976)

Amici believe that informed balancing of these factors makes the conclusion that indigent parents have the right to court appointment of counsel in termination proceedings inescapable.

B. The Private Interest At Stake.

The right of a parent to rear his or her own minor children has consistently been recognized by this Court as a fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment. Quilloin v. Walcott, 434 U.S. 246 (1978). A mother's right to the "care, custody, management, and companionship of her minor children [is a right] far more precious than property rights." May v. Anderson, 345 U.S. 528, 533 (1953). "The primary role of parents in the up-bringing of their children is now established beyond debate as an enduring American tradition." Wisconsin v. Yoder, 405 U.S. 205, 232, (1972).

A mother's right to the "care, custody, management, and companionship of her minor children [is a right] far more precious [...]than property rights." May v. Anderson, 345 U.S. 528, 533 (1953).

Parental rights are part of a spectrum of rights to privacy and automony in family life in the spheres of "marriage, procreation, contraception --family relationship, and child rearing and education," Roe v. Wade, 410 U.S. 113, 152 (1973)(citations omitted); that has been held to encompass extended family relationships, Moore v. City of East Cleveland, 431 U.S. 494 (1977).

> "The entire fabric of the Constitution and the purposes that clearly underly its specific guarantees demonstrate that the rights of marital privacy and to marry and raise a family are of a similar order and magnitude as fundamental rights specifically protected," Griswold v.Connecticut, 381 U.S. 479,495 (1965).

The result of a proceeding to terminate parental rights is the total

deprivation of the right to family integrity. In Stanley v. Illinios, 405 U.S. 645 (1972), this court recognized the magnitude of the constitutional deprivation threatened in such a proceeding. Termination of parental rights is final and irreversible. It "means that the child is dead so far as the parent is concerned". In re William L., 383 A. 2d 1228 (Manderino, J., dissenting), cert. den., 439 U.S. 880 (1978). The identification of termination of parental rights with death is a valid one. Indeed, the termination has been called the "death penalty" for parents of dependent or neglected children.[2]

2. Catz & Kuelbs, The Requirements of Appointment of Counsel for Indigent Parents in Neglect or Termination Proceedings: A Developing Area, 13 J. Fam. L. 223, 233 (1974).

C. The Risk of Erroneous Deprivation

In view of the fundamental importance of the rights involved and of the extremity of the deprivation threatened in termination proceedings, the greatest care should be exercised to prevent the erroneous deprivation of those rights. Unfortunately, the state officials who instigate and adjudicate such proceedings do not typically exercise such care.

Certain recurring and disturbing practices are connected with termination of parental rights proceedings. First, social services officials with their broad discretionary power over the lives of parents and their children in foster care actually "entrap" parents into becoming subject to termination of parental rights. Second, the factors of race, sex and class bias become issues in termination cases regardless of the applicable statutory standards.

Third, social services officials initiate termination of parental rights proceedings without any assurance of the existence of or subsequent effort to find a permanent adoptive home for the child. Fourth, termination of parental rights proceedings are characterized by widespread procedural irregularities. Each of these practices has a significant and improper impact on the result in termination proceedings, as this case clearly illustrates.

1. Contrived Terminations.

Many parents of children in foster care are placed in a position where a case for termination of parental rights can be established against them as a result of acts or omissions of social services officials over which the parents have no control.[3] Frequently, this is

3. The filing of criminal charges of incest between the parents in Doe v. Delaware, No. 79-5932 October Term, 1979 in order to secure custody of their younger children as a prelude to termination proceedings as to all "because we can't prove the [parents] unfitness if there are children in the home")Parents Trial Exhibit 21) provides a particularly blatant example.

accomplished through outright denial of or failure to facilitate parental visitation.[4] In most cases, abandonment or failure to visit with one's child for some specified length of time is a ground for permanent termination of parental rights. Because agency officials control visitation, they have the power to create the grounds for subsequent termination of parental rights by denying or severely restricting the ability of parents and relatives to visit.

It is the experience of Amici that foster care agencies place a low priority on parental visitation. The New York experience is typical of "policies and

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4. Another way in which parents are "entrapped" is the effectively total failure by agencies to provide needed services to correct family problems which led to the initial foster placement. In North Carolina and in other states, there is a statutory prerequisite to termination of parental rights of the agency's "diligent efforts... to stregthen the parental relationship." N.C. Gen. Stat. §7A-289.32(3) This prerequisite was ignored in Lassiter as in many cases in Amici's experience.

and practices that make if difficult if not impossible for parents to visit their children."[5] In New York, a mother is permitted to visit her child for one hour a month or one hour every two weeks at the office of the social services agency. Thus, in the course of one year she will be able to spend a maximum of 12 to 24 hours with her child. In fact, visitation may be discontinued entirely by agency fiat or by court order.[6]

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5. Children's Defense Fund, Children Without Homes (1978) pp.22-24.

6. See Policy Statement Parental Visiting Appendix D, Children's Defense Fund, Children Without Homes, (1978) p.192. Amici can attest from their own experience that the Policy Statement was never implemented and the practices rejected by the Policy Statement continue. In 1980 the New York City Mayor's Task Force on Foster Care recommended that there should be at least one visit between parent and child in foster care a month! Redirecting Foster Care, A Report to the Mayor of the City of New York (1980),37.

See also Doe v. Delaware, No. 79-5932 (October Term, 1979), now pending before this Court, wherein the parents were denied any visitation from the time the children were removed from their parent's home up until the initiation of parental rights termination proceedings several years later.

Appellant clearly was not provided the opportunity to visit with her child. The social worker contacted her only once--after the lengthy separation which formed the original grounds for the termination of her parental rights had occurred--and then, merely to determine if she would waive her right to a hearing before her parental rights were terminated.[10] And the testimony of Mrs. Lucille Lassiter, who visited her grandchild three times in as many years, recites the common experience of a relative's frustrated efforts to find and communicate with the "proper" caseworker concerning promised visitation.[11]

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10. See Trial Tr. 15.

11. See Trial Tr. 8, 51-52.

To visit a foster child, the parent or relative is expected to provide his or her own transportation expenses, often to distant and unfamiliar places,[7] to initiate and confirm appointments with a particular social worker whose indentity frequently changes and who is often absent from the office, to perservere despite visits cancelled without notice and despite scheduling which exclusively accomodates the convenience of social worker and foster parent.

Visitation for a parent who is hospitalized or incarcerated is even more problematic. At many prison facilities, visits by children are prohibited altogether, visiting hours are restricted, and of course the children must be brought by a willing adult. One study reports that many foster care workers opposed bringing

7. Children's Defense Fund, Children Without Homes (1978), 22-23.

children to prison, that incarcerated mothers often experience difficulty in finding out where their children in foster care are and that child welfare workers seldom make any real effort to maintain contact with incarcerated mothers.[8]

The case presently before this Court presents a sampler of ways in which State failure to provide or facilitate visitation can defeat parental rights. Most striking is the agency's reliance for making its case for termination on the failure of Appellant to have contact with her child, knowing full well that Appellant was incarcerated for the greater part of the time period at issue, without their showing that visitation was available under these circumstances.[9]

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8. See McGowan & Blumenthal, Why Punish the Children, a Study of Children ~~of Women~~ Prisoners (1978) pp.12-29.

9. See Juvenile Petition, paragraphs 6&7. See also Trial Tr. 27.

2. Disparate Treatment of Poor, Minority and Single Parent Families.

As this Court has recognized, "the poor and victims of discrimination" resort to foster care placement for their children in disproportionately large numbers. Smith v. O.F.F.E.R., 481 U.S. 816, 833-34 (1977). In New York City in 1979, more than 70% of the children in foster care came from families on public assistance,[12] 55% of foster children were born out of wedlock; and over 50% came from female-headed families.[13] Presently, 84% of the children in the city's foster care population come from minority backgrounds. Of these, 56.5% are black, and 23% are Hispanic.[14] The New York foster care experience typifies national trends.[15]

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12. Foundation for Child Development, State of the Child: N.Y.C. II, (1980) 126

13. Redirecting Foster Care, 6

14. State of the Child: N.Y.C. II, 123

15. See Children Without Homes, 49-34

The status of many natural parents as minority welfare recipients is viewed with disfavor by the agencies and courts who determine the fate of their children. The opinions in termination cases frequently refer disparagingly to the parent's receipt of public assistance and single parent status.[16]

Additionally, the tendency of courts to prefer the nuclear family unit to the extended family custodial arrangements "familiar among [e.g.] black families" noted by this Court, Moore v. City of East Cleveland, 431 U.S. 494 (1977) at 504-506) (plurality opinion) and 509 (Brennan, J., Concurring), intrudes insidiously on judicial decision-making in parental termination proceedings. The element of racial bias is palpable even when not expressed in words.

16. In Re Ray A.M., 48 App. Div. 161, 164 (2d Dept.), aff'd, 37 N.Y. 2d 619 (1975).

The generally vague and imprecise standards utilized in termination proceedings make it difficult to prevent the introduction of these extraneous factors.

The transcript of the trial below clearly shows some of these elements of bias in operation. For example, there is the frequent reference to Appellant's receipt of public assistance, although it has no bearing on the cause of action asserted.[17] The record is strewn with provocative remarks to Appellant and Lucille Lassiter, the Appellant's mother, for which there is no apparent justification. When Appellant denied that her mother had filed a complaint against her, she was told "that was some ghost who came up here and filed it, I suppose".[18] When Mrs. Lassiter sought

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17. Trial Tr. 17-18, 30, 57-58.

18. Trial Tr. 30.

to support the truth of her statements with a religious oath, the Court's response is, "I wish you wouldn't talk like that; it scares me to be in the same room with you."[19] Finally, Mrs. Lassiter is admonished not to "intimidate" or "fool with" the social workers.[20] No reason to justify this warning appears in the record.

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19. Trial Tr p.55

20. Trial Tr p.62

3. A Child's Future After Termination Is Still Uncertain.

Termination of parental rights does not assure a child a known and permanent home. This is particularly true of minority children who disproportionately predominate in the foster care population.[21] Moreover, national studies show that Black and other minority foster youngsters like William Lassiter spend a disproportionate share of time in foster care, receive fewer services and benefits than do white children, and are not provided adoption services adequate to their need and number.[22]

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21. Children Without Homes, 49-52 [The Ethnic composition of New York City's foster care population in 1979 was 52% Black and 23% Hispanic. In 1980 the Mayor's Task Force on Foster Care Services reported that during the year ending September 1979 the goal of adoption was reputed in 4,178 youngsters but only 499 were adopted. Id at 69].

22. Redirecting Foster Care (1980) 70.

That there are harms associated with continued foster care placement is also well known. Many children are inappropriately placed, experience social and emotional deterioration and are maltreated in both foster home and institutional placement.[23] At the same time where a parent cannot resume care of a child and adoption is uncertain, agencies and workers may often resist placement of foster children with their relatives.[24]

Indeed, in this case, rather than place Billy Lassiter with his grandmother and sisters, the county attorney asks the court to "free" him for placement with a hypothetical "mother and daddy

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23. State of the Child II 127-128. See also Children Without Homes (1978) 37-48.

24. Children Without Homes, 20-21.

[who would, of course, be] with [Billy] day in and day out."[25] The attorney argued further that Billy should not be with his grandmother because he did not know her.[26] The fact that Billy did not know who--if anyone--would adopt him was ignored.

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25. Trial Tr 60.

26. Id. p.13

4. Procedural Irregularity In Foster Care Adjudication.

In the course of their experience in representing parents in termination proceedings, Amici have encountered with disturbing frequency serious irregularities in proceedings resulting in the initial placement of the children in foster care, in the continuation of placement, in the possible return of children to parents, and in the termination of parental rights. Foster cases, which concern almost exclusively the rights of poor and minority families, seem to invite a greater disregard of the rule of law by state agencies and the courts than do other cases.[27]

Amici have identified these procedural defects common to foster care

27. See tenBroek, California's Dual System of Family Law: Its Origins, Development and Present Status, Pt. I, 16 Stan. L. Rev. 257 (1964) Pt. II, 16 Stan. L. Rev. 900 (1964), Pt. III, 17 Stan. L. Rev. 614 (1965).

adjudication, virtually all present in the Lassiter proceedings. The first is the frequency of unnecessary ex parte seizures of children. Children are removed from their homes abruptly, often on a pretext, with no contemporaneous notice to parent or relative either of the grounds for the seizure or of the possible remedy.[28] In the instant case, William Lassiter was removed from his grandmother's home, not by court order, but by a ruse. Offering to assist the boy's grandmother in taking him for a medical examination at the local hospital, a caseworker from the Durham County Social Services Department took the child with him and never brought him back.[29]

28. Cf. Sims v. Department of Public Welfare 438 F. Supp. 1179, (S.D. Tex 1977, reversed on procedural grounds, sub nom Moore v. Sims, 442 U.S. 415 (1979)

29. Trial Tr. 44-45

The second defect concerns notice. Vague, conclusory, and irrelevant allegations--which give no meaningful notice of the nature of the proceedings or of the actual gravamen of the abuse, neglect, or other unfitness charged against a parent--are normal.[30] Additionally, the timeliness of the notice given is frequently questionable. The Lassiter record raises many questions concerning the sufficiency and timeliness of the notice given Appellant and her mother of the neglect proceeding the state eventually initiated some time after the ex parte seizure of Billy Lassiter.[31] The initial adjudication of neglect, which resulted in Billy's lengthy foster case placement and which was used as evidence against Appellant at the termination proceedings, was entered on default.[32]

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30. Amici have encountered cases where a telephone call was all the legal process a client received in a neglect proceeding.
31. Trial Tr. 27-034
32. Trial Tr. 29.

The third procedural defect common to Amici's experience is the lack of adherence to rules of courtroom procedure, evidence, and decorum.[33] Unreliable hearsay statements by agency workers are routinely admitted into evidence and relied upon. The statutory requirements for removal of children or termination of parental rights frequently are not followed.[34] Family litigants are often subjected to insulting remarks and lectures in the course of legal proceedings. See section C(2), supra. Indeed, full hearings held on removal or placement of children or on termination of parental rights typically resemble ex parte proceedings more than trials.[35]

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33. The Lassiter transcript is replete with such procedural defects. See Section D, infra.

34. See In re Amos H.H, 59 App. Div.2d 795 (3d Dept. 1977); In Re Guardianship of Denlow, 87 isc. 2d 410 (Fam.Ct. Kings County 1976).

35. See e.g. State v. Jamison, 444 P.2d 15 (Ore. 1968)

The practices described above, which are essentially extra-legal in nature, profoundly affect the legal processes by which parents lose their children for ever. These practices are beyond the capacity of unrepresented parents to comprehend, much less to address.

A knowledge of these practices is required for an understanding of the dynamics of termination proceedings and the development of an effective defense strategy. An attorney knows now to acquire such knowledge and this skill is as important as the marshalling of evidence, examination and cross-examination, and the presentation of legal argument. The parent alone can do none of this.

D. THE DIFFERENCE AN ATTORNEY COULD MAKE

Counsel for the parent in termination proceedings can significantly decrease the risk of an erroneous decision to terminate parental rights by developing and presenting defenses which the parent would be unlikely to recognize on her own, by insuring that the state's burden of proof is met and supported by reliable evidence, and by protecting the client against bias and impropriety. All three of these functions would have been performed routinely by counsel for Appellant had she been represented at trial. All three were well beyond the reach of what she could accomplish alone. And all three would have contributed substantially to the likely accuracy of the outcome of the proceeding.

1. Developing a Defense

The most important way in which Appellant's attorney could have decreased the risk of an erroneous termination of her rights as a parent was by developing her defenses and questioning

the jurisdictional basis of the case against her. Appellant clearly had no understanding of the standard under which her rights were being terminated and thus could neither identify nor develop her own defenses. The trial transcript suggests that she had a number of viable defenses.

The basis under the North Carolina statute, N.C. Gen. Stat. §7A-289.22, for terminating appellant's rights was that she had been found, three years before, to have neglected her child. The trial transcript suggests that Appellant could have moved to vacate the finding of neglect made against her on default in 1975.[36]

36. Appellant explained at trial that she hadn't understood why she was being asked to go to court (Tr. 31-33), that she had not gotten any written notice of the neglect charges, (Tr. 29-30) and that by the time she was notified by phone on the day of the hearing, she could not go because she had no one to care for her other children, and had no transportation available to get to court (Tr. 32) Furthermore, Appellant denied at trial all of the findings made against her in the neglect proceedings. She said she had provided William with medical care and taken him to the doctor, and that she had papers to prove it (Tr. 27) that she had never misappropriated the children's welfare check (Tr. 30-31), and that no one had ever pulled the baby's hair out. (Tr. 34-35) Her mother denied having complained about her (Tr. 48-49)

As part of its case for termination, the state alleged that Appellant had wilfully left her child in foster care for two years without improving the conditions which led to his original placement, in spite of the deligent efforts of the Department of Social Services to reunite the family. The transcript suggeststwo defenses to this charge. First, for two years before the order terminating her rights, Appellant was in prison. She was unable to take any steps to improve her condition while she was incarcerated. During her imprisonment, she made a concerted, if futile, effort through her mother to have her child removed from foster care and sent to live with her mother.[37] There is no evidence of any kind in the record to indicate that there was anything about Appellant's mother's home that would make it suitable for Appellant other children, but unsuitable

37. Trial Tr. 51-52.

for this child. Counsel for Appellant would have attempted to show that placement of this child with his grandmother and sisters was the least detrimental alternative given his mother's incarceration and the avowed preference of the state for keeping families together.

Second, the Durham County Department of Social Services did not make diligent efforts to reunite the family. The social worker who testified at the hearing said she visited Appellant only once, and that visit was not to attempt reunion but to inform appellant of the agency's intention to terminate her parental rights.[38]

No one at the trial developed any of these defenses the way appellant's counsel would have. Appellant herself was unable to do so, and the state and the courts were primarily concerned with concluding the hearing and entering an order of termination as quickly as possible.

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38. Trial Tr. 15

Proceedings to terminate parental rights are not a domestic relations matter to be left to the broad discretion of state courts. Rather, they are complex litigations involving the ultimate intrusion of the state in the private life of the family. The North Carolina termination statute contemplates multiple grounds for terminating parental rights. N.C. Gen. Stat §7A-289.32. The statute incorporates the entire child dependency scheme in its scope. See N.C. Gen. Stat. §7A-289.32 (2). Analyzing a statutory scheme of similar complexity, the Unites States Circuit Court for the Fifth Circuit commented on the parents'need for an attorney in Florida dependency proceedings:

> "The dependency proceedings is complex in terms of the procedural,evidentiary and substantive law applicable to the hearing. In addition to this confusion legal framework, the parent is confronted with "the full panolpy of the traditional weapons of the state." Davis v. Page, __ F.2d __, (5th Cir. 1980)

In Florida, termination of parental rights is one of the many dispositional alternatives in a dependency proceeding. (Fla. Stat §39.11 (4).

Although separated into a discrete statutory provision, North Carolina's termination statute contemplates proceedings of analogous complexity both procedurally and substantively. Compare Fla. Stat. Ch.39 with N.C. Gen. Stat. Sec. 7-A.

The Davis court concluded that the value of counsel in dependency proceedings in Florida was "inestimable," just as necessary as counsel in a criminal case. Id, _ F2d __ (citing Powell v. Alabama, 287 U.S. 45 (1932).

2. Insuring that the State's Burden of Proof Is Met and Supported by Reliable Evidence.

The parent appearing in court alone, like Appellant, is likely to be confused, frightened, and angry at the prospect of losing a child forever.[39]

She is "little more than a spectator," Davis v. Page, 442 F. Supp. 258,260-61 (1977) affd, _ F2d _ (5th Cir.1980). On the other side is a state agency,

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39. See Trial Tr. 32, 34.

represented by an attorney and a social worker for whom the termination proceeding is routine work.[40] The state's case is typically based on reports and professional opinions by state social workers and psychologists. The unrepresented parent often cannot even understand these reports, and is not able in court to question or rebut them.[41] Judges tend to rely heavily on the evidence, both fact and opinion, presented by agency case workers.[42]

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40. See State v. Jamison, 444 P.2d 15, 17 (Ore. 1968)

41. See e.g. Davis v. Page 442 F. Supp. 260 (S.D. Fla. 1977) aff'd - F2d - (5th Cir. 1980); State v. Jamison, supra, 499 P.2d at 19 ("for the indigent mother, however, the entire proceedings were incomprehensible.").

42. Family court judges identify with and take a protective attitude toward agency social workers who appear before them and place great weight on both the factual statments and the opinions of these workers. ABA Juvenile Justice Standards Project, Standards Relating to Counsel for Private Parties, 150,174,184.

However, the evidence presented by these case workers frequently lacks the most basic indicia of reiability or accuracy. The most important piece of evidence usually presented by the state in a termination proceeding is the agency's case record, which is either introduced into evidence or used by the social worker as the basis for her testimony.[43] The function of the attorney is to test the contents of the record for reliability and to prevent the introduction of "random irresponsible material beyond the reach of the usual tests for accuracy." In Re Leon R.R.,48 N.Y 2d 117 (1979).

Had Appellent been represented by counsel, her attorney could have, through evidentiary objections and cross-examination,

43. About half of the state's testimony at the Appellant's trial was simply recitation from the case record. (Trial Tr. 9-19).

placed the case record and the testimony of the social worker in perspective by giving the judge a basis upon which to evaluate its reliability. For example, counsel for Appellent would have probed for the names of the anonymous sources who convinced the social worker that Appellant's mother was not equipped to care for her grandson Billy.

Similarly, Appellant's attorney could have provided a basis for evaluating the opinions offered by the social worker by cross-examining her about both her professional qualifications and the foundation for her opinions. Both exercises would contribute significantly to the accuracy of the outcome of the proceeding, and both were clearly beyond the reach of appellant herself.

3. Protecting the Client Against Bias and Impropriety

One of counsel's major functions is to protect her client from bias and impropriety. This is particularly true of counsel for an indigent, minority client.

Counsel can limit the admission of irrelevant and prejudicial testimony by insisting on the duty of the court and parties to adhere to rules of law, can help the court to understand and empathize with the client's life circumstances, and can act as a buffer between the client adversary parties and witnesses

For example, had Appellant been represented by an attorney, the attorney could have tried to prevent prejudical testimony about her welfare status from entering the record, and could have helped her to explain the difficulties she encountered in visiting her child,[44] her belief that she was wrongfully imprisoned, and her strong desire to keep her child with her other children within her extended family.

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44. Counsel would also have tried to schedule visits between mother and child before the hearing.

One special source of bias against an unrepresented parent in a termination proceeding arises from the fact that the parent is in a very real sense, herself on trial. No matter what the standard under which the termination proceeding is conducted in a particular state, the parent's character and ability to be responsible for and care for children will always be in some sense at issue. The judge's personal observations of the parent in court will affect his decisions. If, as is usually the case, the unrepresented parent is unfamiliar with court procedures and so slows down the proceedings, there is a considerable likelihood that her lack of artfulness in court will weigh against her. Again, the Lassiter case is a good example. At trial the judge repeatedly snapped at Appellant and her mother to be quiet,[45] and on one occasion threatened to lock Appellant's mother up

45. Trial Tr. 13, 14, 24, 42, 53.

for speaking out of turn.[46] He criticized Appellant's inartful cross-examination,[47] and ultimately stopped it. Finally he expressed his exasperation at the inefficiency of the proceeding:

> I tell you what, lets just skip all this. You question her please.
> Just answer his questions. we'll be here all day at this rate. I mean, we are just wasting time
> Trial Tr. 52.

It has been the experience of Amici that the mere presence of an attorney representing a parent often alleviates the court's bias against the parent. The attorney's presence, perhaps because he or she is also a professional, seems to lend added credibility to the parent's cause. The attorney can also shield the parent from the risk of having her "character" judged by her ability to represent herself in a legal forum.

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46. Trial Tr. 14.
47. Trial Tr. 20-21, 24.

E. THE STATE'S INTEREST IN FAIR ADJUDICATION IS CONSISTENT WITH ITS INTEREST IN FAMILIES AND CHILDREN.

Had Appellant had counsel to represent her at trial, that counsel could have made a significant contribution to the fairness and the accuracy of the proceeding. The same is true of most termination cases. By minimizing bias against the parent, by pointing out the inherent weaknesses in the state's case in ways that the untrained, uneducated parent cannot, and by developing and presenting defenses which the parent herself may not recognize, the attorney can provide an important additional safeguard of the parent's basic rights to family integrity.

In so doing, the attorney would also be serving the interests of the state. The primary purpose of procedural protections in our judicial system is to insure the fairness and the accuracy of judicial determinations.

In re Gault, 387 U.S. 1 (1967), McKeiver v. Pennsylvania 403 US 528 (197]), Mathews v. Eldridge, 424 US 319 (1976). The state always has a substantial interest in the fairness and accuracy of its own adjudications. Stone v. Powell 428 US 465 (1976), Parham v. J.R. 422 US 584 (1979).

The state has a further strong interest in preserving and protecting families, in not breaking apart a family when such drastic action is unnecessary. Parham v. J.R. 422 U.S. 584 (1979); Stanley v. Illinois, 405 U.S. 645 (]972). As this court recognized in Stanley, the state which terminates parental rights unneccessarily spites its own articulated interests. The State of North Carolina has also, in its termination statute, made it a state goal to avoid unnecessary terminations:

> It is the further purpose of this Article to recognize the necessity for any child to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all children from the unnecessary severence of a relationship with biological or legal parents. N.C. Gen. Stat. §7A-789.22(a).

Minimizing the risk of an unfair and unreliable decision to terminate parental rights through the provision of assigned counsel for parents would thus serve the interest of the state in fair adjudication as well as its interest in preserving families and protecting children.

The state has no interest in promoting terminations of parental rights and adoptions for their own sake. Indeed, in the absence of reliable proof that termination of parental rights is required to protect a child from serious long term harm which cannot be obviated by less drastic alternatives, such as placement of the child with relatives, the state may not prefer termination of parental rights and adoption--creatures of statute unknown at common law[48]--to the natural ties binding parents, children, siblings, and kin.

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48. See. e.g., Mnookin, Child-Custody Adjudication: Judicial Functions In the Face of Indeterminacy 39 J.L. and Contemp. Prob. 226, 245,n.95 (1975)

Given the overwhelming odds which face parents and families of children in foster case in termination proceedings, the risk that parental rights would not be terminated in the proper case is de minimus. Finally, the uncertain prospect of adoption for many children, and the fact that more and more often the state must support adopted childred financially through payment of an adoption subsidy, also favor careful adjudication.

Therefore the same attorney whose presence would add greater protection for the parent's rights, would also serve the state's interest by making the proceeding more accurate and decreasing the risk of unnecessary termination without impeding proper terminations. These state interests are more important than speed and efficiency or administrative cost.

F. What Process Is Due

When all the relevant characteristics of the termination proceeding are weighed and considered together, they require the conclusion that counsel must be provided for indigent parents faced with possible termination. The fundamental nature of the parent's interest in her relationship to her child, the momentous and grievous loss caused by the termination of the parent-child relationship, the formality and complexity of the termination proceeding, the very grave risk that a parent attempting to represent herself will be erroneously but permanently deprived of her child, the unquestionable value of counsel in preventing such a result, and the fact that the state's interest in preserving families and protecting children will be advanced by fair and reliable adjudication, all make such a conclusion inescapable.

The opportunity to be heard is the "fundamental requisite" of due process of law, Goldberg v. Kelly, 397 U.S. 254, 267 (1970), quoting Grannis v. Ordean, 234 U.S. 385,394 (1914). Appellant herein was given a hearing prior to the termination of parental rights. But that hearing utterly failed to satisfy the requirement that the opportunity to be heard be granted not only at a meaningful time but also in "a meaningful manner." Armstrong v. Manzo, 380 U.S. 545,552 (1965).

An ostensible opportunity to be heard is fatally deficient if it is not "tailored to the capacity and circumstances of those who are to be heard." Goldberg v. Kelly, 397 U.S. 254, 268-269 (1970), quoted in part in Mathews v. Eldridge, 424 U.S. 319,349 (1976). Many of the indigent parents whose parental rights the State seeks to terminate have limited schooling and are totally un-

sophisticated in legal matters. The transcript of the termination hearing below shows beyond a doubt that Appellant had no idea of what was expected of her at that hearing or of what rights and choices she might have exercised to her benefit. The hearing at which Appellant's rights to her son were cut off afforded her a hollow formality; it failed to provide her with the constitutionally guaranteed "meaningful" opportunity to be heard.

This Court has concluded that, absent a knowing and intelligent waiver, no criminal defendant can be imprisoned for any offense unless he has been represented by counsel at his trial, Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963); Argesinger v. Hamlin, 407 U.S. 25 (1972).

In those instances in which the Court has examined an indigent's right to have counsel appointed in a non-criminal

proceeding, the decisions have rested on whether the proceedings resembled criminal proceedings in purpose, structure, and possible outcome. Whether the proceedings were denominated civil or criminal has not been dispositive, Specht v. Patterson, 386 U.S. 605 (1967); In re Gault, 387 U.S. 1 (1967).

The nature and consequences of a proceeding for termination of parental rights closely parallel those of a criminal case: the permanent loss of a child is at least comparable in severity to incarceration.

> .....Loss of a child is one of the severest possible sanctions that can be taken against a parent; it is a deprivation which can be equated with imposition of a fine or imprisonment through criminal proceedings. Indeed it is not unlikely that many parents would choose to serve a prison sentence rather than to lose the companionship and custody of their children. Davis v. Page, __F.2d__(5th Cir. 1980); decided June 6, 1980.

To be meaningful the right to counsel for indigent parents in termination proceedings must include the concomitant right to an assigned counsel. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); In re Gault, 387 U.S. 1 (1967). The reason is obvious and has been long recognized by this Court: a vision of equal justice demands that the poor have an opportunity to receive the same treatment in the courts as the wealthy. Edwards v. Califaornia, 314 U.S. 160 (1941); Griffin v. Illinois, 351 U.S. 12 (1956). And without the right to assigned counsel the indigent will not be provided the services of an attorney. Such assignment is the only way that representation can be ensured since poor persons civil legal needs have been and remain unserved.*

*An examination of what legal services are available to the poor shows that their legal needs have been unmet. In 1977, the General Accounting Office (GAO) surveyed a number of poor households about the incidence of legal problems and found that sixty-four per cent of those who had a legal problem received no legal assistance at all, see Free Legal Services for the Poor - Delivery Can be Improved Through Increased Coordination, Community Legal Education, and Outreach, Appendix III, Results of GAO'S Potential Client Interview, Washington D.C., 1978, pp. 95-99.

The Legal Services Corporation has estimated that its programs in fiscal 1980 are only able to service one third of the estimated six million legal problems of poor civil litigants. See, The Legal Services Corporation and the Activities of Its Grantees, September, 1979, at p. 17. Indeed, as Amici's experience shows legal services offices in New York City and throughout the country ordinarily turn away numerous income eligible clients because of the office's already staggering caseloads.

The G.A.O. report on Free Legal Services for the Poor notes that pro bono and other legal resources only served a very small additional part of indigents legal needs, G.A.O. Report, supra, pp. 5-6, Appendix I, p. 24.

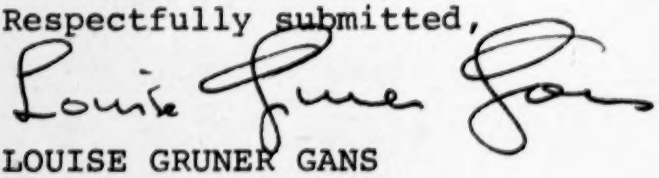
Appointment of counsel should be mandated in every case absent a knowing and intelligent waiver of that right. The factors that this Court has noted as requiring an absolute right to counsel in criminal cases are present in termination proceedings--opposing counsel, formal rules of evidence, procedural rights, and an adversarial format, Gideon v. Wainwright, 372 U.S.335 (1963). Unlike Gagnon v. Scarpelli, 411 U.S.778 (1973) where a right to counsel in probation and parole revocation cases was recognized on a case by case basis only, partially because of the limited due process rights of prisoners, the rights of parents in termination proceedings are fundamental and must be accorded the fullest protection.

CONCLUSION

For all of the foregoing reasons, the judgment of the North Carolina Court of Appeals should be reversed.

Dated: November 20, 1980

Respectfully submitted,



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